



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**SUCCESSION CAUSE NO. 48 OF 2002**

**IN THE MATTER OF THE ESTATE OF CHERATSI KIGEN JONATHAN (DECEASED)**

**THROUGH**

**SARAH JEMUTAI CHUMBA .....1<sup>ST</sup>  
PETITIONER**

**ANTHONY K. CHUMBA.....2<sup>ND</sup>  
PETITIONER**

**AND**

**MARIA KOMEN KANDIE.....1<sup>ST</sup>  
OBJECTOR**

**MATHEW KIMUTAI CHUMBA.....2<sup>ND</sup>  
OBJECTOR**

**RULING ON THE PRELIMINARY OBJECTION**

Application dated 12<sup>th</sup> March 2007 is made by the two Objectors seeking orders for the revocation of the grant issued on the 13<sup>th</sup> December 2002 and confirmed on 10<sup>th</sup> July 2003 respecting the estate of the late Cheratsi Kigen Jonathan.

At the time of the confirmation of the grant, no objection had been raised. However, after the confirmation, summons for revocation of the grant were filed herein on the 6<sup>th</sup> July 2006 i.e. three years after confirmation. The summons were filed by the first Objector Maria Komen Kandie but were withdrawn by consent of the parties on the 12<sup>th</sup> March 2007. Fresh summons for revocation of grant were

made on 12<sup>th</sup> March 2007 and filed herein on the 13<sup>th</sup> March 2007 in the name of the two Objectors. This is the application subject of the notice of Preliminary Objection dated 29<sup>th</sup> October 2010 and filed on 2<sup>nd</sup> November 2010 by the Petitioners.

The basic ground for the objection is that the objection proceedings herein are bad in law and vexatious and that the objectors should file proceedings under Order 36 Rule and 2 of the Civil Procedure Rules.

**MR. CHEMITEI**, learned Counsel, submitted on behalf of the Petitioners that under Order 37 of the new Civil Procedure Rules, the Objection proceedings ought to be by way of Originating summons and since this is not the case, then the proceedings are defective and should be dismissed with costs.

Learned Counsel went on to submit that the subject matter of the cause is land parcel No. **UASIN GISHU/KAPTAGAT/130** which has already been transferred to the Petitioners through the confirmed grant. Therefore by virtue of the transfer, Order 37 comes into operation as it envisages a situation for the Objector to file an Originating Summons as an heir to the estate.

In response to the foregoing submissions by the Petitioners, the Objectors through learned Counsel, **MR. CHEPSAIGUT**, submitted that that application is brought under S. 76 of the Succession Act which deals with revocation of grants at any stage. Further, Articles 22 and 23 of the Constitution of Kenya advises disregard of matters of technicalities.

The Objectors contend that the Succession Act has enough provisions dealing with Succession Causes similar to the present one and that S. 76 of the Act gives Court unfettered powers to revoke a grant. Further, Rule 63 of the Succession Rules provides for the provisions of the Civil Procedure Act which may apply to Succession Causes and these do not include Order 36 (or 37) which are being relied upon by the Petitioners.

Having heard the rival submissions by both sides, the issue for consideration is whether the application dated 12<sup>th</sup> March 2007 should be heard within this cause or by way of Originating Summons through a separate suit. The application is made under Rule 44 (1) of the Succession Rules and S. 76 of the Succession Act.

Rule 44 (1) provides that:-

**“Where any person interested in the estate of the deceased seeks pursuant to the provisions of S. 76 of the Act to have a grant revoked or annulled he shall, save where the Court otherwise directs, apply to the High Court for such relief by Summons in Form 107 and, where the grant was issued through the High Court, such application shall be made through the registry to which and in the cause in which the grant was issued or where the grant was issued by a Resident Magistrate, through the High Court Registry situated nearest to that Resident Magistrate’s Registry.”**

This provision allows a party to make an application for revocation or annulment of grant in the cause in which the grant was issued. The subject grant was issued in this very Cause No. 48 of 2002.

S. 76 of the Succession Act provides for the revocation or annulment of a grant whether or not confirmed, at any time on application by any interested party or on a Court’s own motion upon specified

grounds.

This provision does not restrict time within which an objection may be raised and it matters not whether or not a grant has been confirmed.

Rule 63 of the Succession Rules provides for the application of the Civil Procedure Rules and High Court (Practice and Procedure) Rules but it specifies that provisions of the Civil Procedure rules applicable to Succession Causes. The said provisions do not include Order 36 (now, Order 37). S. 2 (1) of the Succession Act provides for the application of the Act and states that:-

**“Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of these persons.”**

Clearly, the law of Succession Act (Cap. 160 Laws of Kenya) inclusive of its subsidiary legislation is a comprehensive code of substantive and procedural succession law and since Order 36 or Order 37 of the Civil Procedure Rules as excluded by Rule 63 of the Succession Rules, it cannot apply in the present circumstances. Consequently, the application by the Objectors dated 12<sup>th</sup> March 2007 is proper before this Court. The Preliminary Objection by the Petitioners lacks merit and is hereby dismissed with costs.

**J. R. KARANJA**

**JUDGE**

**[Read and signed this 16<sup>th</sup> day of February 2011]**

**[In the presence of Mr. Boinett for Chepsaigut for the Respondent]**